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No. 06-542

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IN THE

Supreme Court of the United States

DF, by his Parent and Natural Guardian,
ANDREW FINKLE,

Petitioner,

v.

BOARD OF EDUCATION OF SYOSSET CENTRAL SCHOOL DISTRICT; JAMES KASSEBAUM, Both Individually and In His Capacity as Principal of the HARRY B. THOMPSON MIDDLE SCHOOL; and CAROLE G. HANKIN, Both Individually and in Her Capacity as Superintendent of the SYOSSET CENTRAL SCHOOL DISTRICT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Preliminary Statement 1

I. THE ANONYMOUS STATEMENTS ADMITTED INTO EVIDENCE AT PETITIONER'S DISCIPLINARY HEARING WERE NECESSARILY UTILIZED TO SUSTAIN THE CHARGES AGAINST PETITIONER 2

II. THE TESTIMONY AT THE DISCIPLINARY HEARING SHOULD NOT HAVE BEEN ACCEPTED FOR ITS TRUTH UPON A MOTION PURSUANT TO FED.R.CIV.P. 12(b)(6).... 4

Conclusion 5

TABLE OF AUTHORITIES

Cases

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 4

Newsome v. Batavia Local School District, 842 F.2d 920 (6th Cir. 1988)..... 3

Rippy v. Board of School Trustees, Mooresville Consolidated School Corporation, 2000 U.S. Dist. LEXIS 7427 (S.D.C. Indiana 2000) 3

Constitutional Provisions

United States Constitution, First Amendment ..... *passim*

Other

Fed.R.Civ.P. 12(b)(6)..... 2, 4

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner, DF, by his parent and natural guardian, Andrew Finkel, petition for a writ of certiorari to review the dismissal of petitioner's amended complaint alleging violations of his procedural due process rights and rights guaranteed by the First Amendment. In opposition, respondents contend that petitioner was afforded all the procedural due

process required under the United States Constitution when he was suspended from school for thirty (30) days, and that the utilization of anonymous student statements to establish the disciplinary charges resulting in petitioner's suspension was not prejudicial. Respondents also contend that a determination at the pleading stages that petitioner's fictional story constituted a true threat and created a substantial risk of disruption was properly based upon the record from the administrative disciplinary hearing.

As explained below, the anonymous statements admitted into evidence at petitioner's disciplinary hearing were necessarily utilized to sustain the charges against DF because those statements were the only arguable evidence that a student felt threatened or harassed. Further, the acceptance of the truth of the testimony contained in the transcript of the disciplinary hearing should not be permissible upon a Fed.R.Civ.P. 12(b)(6) motion because a District Court should undertake its own factual analysis to determine if a First Amendment violation has occurred, and a District Court should not give deference to factual findings arrived at through a school disciplinary procedure.

I. THE ANONYMOUS STATEMENTS ADMITTED INTO EVIDENCE AT PETITIONER'S DISCIPLINARY HEARING WERE NECESSARILY UTILIZED TO SUSTAIN THE CHARGES AGAINST PETITIONER

Respondents contend that the utilization of the anonymous statements at the disciplinary hearing was not prejudicial to the petitioner, and thus there was no due process violation (*see* Brief in Opposition, pp. 15-16). However, petitioner was suspended upon a finding that he had threatened and harassed other students, not any teacher or school administrator. Thus, in order to sustain the charges against petitioner it was necessary to show that some students were threatened or harassed by petitioner's story.

The only evidence submitted at the hearing that could have arguably demonstrated that a student felt threatened or harassed by petitioner's story were statements contained in the anonymous writings submitted into evidence at the disciplinary hearing. The school district's attorney prosecuting the matter obviously felt the need to submit these statements into evidence in order to establish the charges against petitioner. And, that petitioner was charged with wrongful conduct towards other students demonstrates that the subjective assessment of the school's personnel would not have been sufficient to sustain the disciplinary charges that led to petitioner's suspension.

In addition, respondents' contention that under New York law, petitioner could have subpoenaed the students who gave the statements in order to cross-examine them at the hearing does not make any sense since the identities of the students were not disclosed to petitioner. Obviously, the petitioner would not be in a position to subpoena an unidentified student.

Whether the utilization of anonymous statements to establish disciplinary charges against a student would violate procedural due process has been determined by the lower courts with mixed results and without the aid of this Court's guidance (*compare, e.g., Rippy v. Board of School Trustees, Mooresville Consolidated School Corporation*, 2000 U.S. Dist. LEXIS 7427 [S.D.C. Indiana 2000] with *Newsome v. Batavia Local School District*, 842 F.2d 920 [6th Cir. 1988]). Thus, whether a student is entitled to a full factual hearing before he or she is suspended for longer than ten (10) days, and whether utilizing anonymous statements at an evidentiary hearing to establish the charges against a student would violate procedural due process, are issues that should be ruled upon by this Court.

II. THE TESTIMONY AT THE DISCIPLINARY HEARING SHOULD NOT HAVE BEEN ACCEPTED FOR ITS TRUTH UPON A MOTION PURSUANT TO FED.R.CIV.P. 12(b)(6)

Respondents contend that the dismissal of petitioner's First Amendment claim was proper because the factual record required to justify petitioner's suspension was contained in the transcript from the disciplinary hearing, and since the Amended Complaint referenced the disciplinary hearing, the testimony contained in the transcript could be accepted for its evidentiary value upon a motion to dismiss under Fed.R.Civ.P. 12(b)(6) (Brief in Opposition, pp. 20-21).

This Court has held that in the context of First Amendment claims the District Court is required to undertake a de novo review and should not give deference to administrative factual determinations (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 [1995]). Here, respondents argue that this rule is inapplicable where there has been a transcript maintained in the context of a school disciplinary hearing, and that a Court may simply rely on the transcript to make a determination as to whether there has been a First Amendment violation.

Respondents' contention effectively eviscerates in the context of school disciplinary hearings the requirement that an independent factual analysis be undertaken to determine First Amendment claims. Whether a separate rule should be established for school disciplinary hearings as compared to other administrative procedures should be determined by this Court.

Here, the disciplinary hearing was conducted without any rules of evidence or procedure, with hearsay statements routinely being admitted, not to mention anonymous written statements by other students. To permit the District Court to accept as true the statements contained in the transcript from

the disciplinary hearing upon a motion to dismiss a First Amendment claim allows into evidence testimony that would otherwise be precluded, and effectively deprives the petitioner of an opportunity to introduce any evidence to support his claim.

This case presents a critical issue to be decided by this Court, *i.e.*, whether deference should be given to factual determination made in the context of school disciplinary administrative hearings when there are First Amendment claims being asserted. This Court has never established such a rule, and while petitioner would contend that such a rule would deprive plaintiff of First Amendment protections previously recognized by this Court, it is an important issue that should be addressed in the context of this case.

CONCLUSION

Accordingly, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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January 3, 2007